SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1057

LOUIS E. WOLFSON AND ELKIN B. GERBERT,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Louis E. Wolfson and Elkin B. Gerbert pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported. It appears in CCH Fed. Sec. L. Rep. ¶ 92,328 (2d Cir., Dec. 27, 1968) and is reprinted as Appendix A hereto, pp. A-1 to A-12, *infra*. The opinion of the District Court denying certain pretrial motions is reported at 269 F. Supp.

621 (S.D.N.Y. 1967), and is reprinted as Appendix C hereto, pp. C-1 to C-10, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1968. A timely Petition for Rehearing was denied on January 23, 1969. (Appendix B, p. B-1, *infra.*) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. (a) Whether the Securities Act of 1933 can be construed to prohibit the sale in normal brokerage transactions of securities owned by a controlling person of the issuing corporation.

(b) Whether, if so, the Securities Act of 1933 is unconstitutionally vague as applied in this case.

2. Whether defendants are denied due process when they attempt to challenge the statute under which they were convicted as unconstitutionally vague and are denied standing to make that challenge because their defense at trial was that they were ignorant of the requirements of the statute—especially where it is implicit in the verdict that the jury rejected the ignorance defense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Section 5(a), Securities Act of 1933, 15 U.S.C. § 77e(a):

"Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

"(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

Sections 4(1) and 4(2), Securities Act of 1933, 15 U.S.C. §§ 77d(1) and (2):[1]

"The provisions of section 77e of this title shall not apply to any of the following transactions:

"(1) Transactions by any person other than an issuer, underwriter, or dealer, transactions by an issuer not involving any public offering; . . .

* * *

"(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders."

Section 2(11), Securities Act of 1933, 15 U.S.C. § 77b(11):

"The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the

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[1] This is as the Statute read prior to amendment in 1964. The 1964 amendment renumbered § 4(2) to § 4(4) and revised it to read: "[B]rokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders." We refer to the pre-1964 version throughout—the Statute as it read during the period of the alleged conspiracy.

distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking, but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

STATEMENT OF THE CASE[2]

Petitioners were charged in a nineteen count indictment (66 Cr. 720, S.D.N.Y.) with eighteen counts of selling and one count of conspiring to sell unregistered common stock of Continental Enterprises, Inc. ("Continental")— an unlisted company—in violation of Section 5 of the Securities Act of 1933. Continental was the licensee of a new promotional product—Propel-Pak. Petitioner Wolfson was neither an officer nor director of the company. He was, however, its largest shareholder. In 1954, Mr. Wolfson had acquired shares of Continental as his pro rata portion of a distribution of stock by another corporation (Tr. 1951-52). Between August 1, 1960 and January 3, 1962,[3] to raise money for other purposes, he had sold 404,150 of

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[2] References to the appellants' (petitioners here) Appendix and Supplemental Appendix in the Court of Appeals are denoted by "A" preceding the page reference; references to the typewritten transcript are denoted as "Tr."

[3] The Government stipulated that the period of the alleged conspiracy was January 1, 1960 to January 31, 1962 (Tr. 214). It was also stipulated that at all relevant times there were 2,510,000 shares of Continental issued and outstanding (Tr. 217).

these shares through six brokers, all of whom were members of the New York Stock Exchange. No registration statement was in effect as to these shares. All of the sell orders for these trades were relayed to the brokers by Petitioner Gerbert, a director of Continental.[4]

Prior to trial, petitioners moved to dismiss the indictment on the ground that no offense was stated. They argued that Section 5 does not prohibit a controlling person from selling unregistered stock when such a person is not an "issuer, underwriter or dealer" and when the broker involved acts solely as a broker and not as an underwriter. The Court denied the motion, holding that at trial the petitioners "may be found to be controlling persons who used underwriters to distribute stock to the public, or to be themselves underwriters." (Appendix C, p. C-10, *infra.*) The motion was renewed, unsuccessfully, at the close of the Government's case and at the close of the evidence (Tr. 1131-66, 2283-85).

At the trial, petitioners did not dispute the fact that Continental stock was sold or that it was not registered. Rather, they contended that they believed the registration requirements did not apply to stock of unlisted companies, such as Continental, and went on to demonstrate that their past experience and contact had been only with listed companies. Petitioners testified to their belief that there were no restrictions on the sale of their own stock if the company was not listed

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[4] Petitioner Gerbert had engaged in the sale of some of his own stock during the period mentioned above, but none of the substantive counts of the indictment concerned those shares. Petitioner Gerbert was brought into the substantive counts of the indictment by the Aiding and Abetting Statute, 18 U.S.C. § 2.

on a stock exchange (*e.g.*, Tr. 1750, 1843, 2126, 2132, 2133-34, 2200-03, 2219-20).[5] They contended that if such confusion existed, any violation of Section 5 which may have occurred would not have been wilful—an essential element of the crime charged. The Government characterized petitioners' defense not as confusion over the applicability of the registration provisions, but as total ignorance of the existence of those provisions. In rebuttal, the Government attempted to prove knowledge of the existence of the registration provisions.[6]

Petitioners also contended that Section 5 on its face did not apply to their transactions. This contention was first raised in the pretrial motion mentioned above and was renewed throughout the trial (Tr. 1131-66, 2283-85). In essence, petitioners argued that their transactions were exempt under Section 4(1) because

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[5] Their testimony indicated that they apparently had confused the registration provisions of the 1933 Act with the registration provisions of Section 12 and the filing requirements of Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78l, 78p, as the latter read at the time of the transactions. The subsequent 1964 amendments made these sections applicable to certain over-the-counter stocks, including Continental.

[6] It did this by offering Government Exhibits 17 and 21 into evidence. The exhibits were of crucial importance on the question of wilfulness. Neither exhibit involved nor was in any way connected to Mr. Gerbert, yet both were admitted against him over objection. The jury was not instructed that they were not to consider these exhibits in regard to Mr. Gerbert. On appeal, it was urged that the admission of the exhibits was reversible error as to Mr. Gerbert, but the decision of the Court of Appeals in no way touched on this contention. The point was urged again in a petition for rehearing, which was summarily denied. See Appendix B, p. B-1, *infra*. Should Certiorari be granted, we intend to urge that admission of these exhibits as against Mr. Gerbert was so prejudicial that he was denied a fair trial and meaningful appellate review.

petitioners were not issuers, underwriters, or dealers. They also argued that the brokers' transactions were exempt under Section 4(2) (now 4(4)) and that therefore the brokers were not underwriters.[7] The Court did not charge the jury concerning whether or not petitioners were issuers, underwriters or dealers. Concerning brokers, the Court, in accord with the Government's theory (A242-43), charged as follows:

> "For the purpose of this case you cannot find that a particular sale of unregistered Continental stock by the defendant was illegal unless that sale was made through an underwriter." (A119)
>
> * * *
>
> "The government contends that Louis Wolfson was a controlling person of Continental Enterprises and that the various brokers through whom he sold his stock acted as underwriters.
>
> "If you find that Louis Wolfson was in control of Continental and the brokers through whom he sold the Continental acted as underwriters you must then decide whether Wolfson's sales were part of a distribution. If they were part of a distribution the transactions were not exempt from the registration requirements of the Securities Act of 1933.
>
> "Similarly, the same rule would apply to Gerbert, who occupied a managerial relationship with the company." (A119-20)

The jury returned a verdict of guilty on all counts against both petitioners. Mr. Wolfson was sentenced to concurrent prison terms of one year on each count,

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[7] At the trial all brokers questioned on the subject testified that the sales of Continental stock were made through them in regular brokerage transactions at normal stock exchange commissions and without solicitation of orders. (Tr. 621, 666, 690-91, 716, 745-46, 849, 863-65, 974-75.)

to pay fines of $100,000, and to pay the costs of prosecution (A201). Mr. Gerbert was sentenced to concurrent terms of six months on each count and to pay fines of $50,000 (A203).

On petitioners' appeal the judgments of conviction were affirmed. The Court of Appeals held that petitioners were not exempt under Section 4(1) because that section exempts only transactions, not persons. The Court held further that Mr. Wolfson was a controlling person and, therefore, the brokers selling for him themselves became "underwriters" as defined by Section 2(11) of the 1933 Act. The Court then stated: *"In short, the brokers provided outlets for the stock of issuers and thus were underwriters . . . . Wherefore the stock was sold in 'transactions by underwriters' which are not within the exemption of § 4(1). . . ."* (Appendix A, p. A-4, *infra*; emphasis added.)[8] The Court of Appeals also rejected the contention that the transactions were not by underwriters by virtue of the fact that the brokers were exempt under Section 4(2) (now 4(4)), holding *"that § 4(4) was designed only to exempt the brokers' part in security transactions. . . . Control persons must find their own exemptions."* (Appendix A, pp. A-4 to A-5, *infra*; emphasis added.)

The Court held that petitioners lacked standing to assert that Sections 4 and 5 were unconstitutionally vague as applied to them and so did not consider the contention:[9]

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[8] The Court found it was clear that petitioners' sales involved a "distribution." (Appendix A, p. A-5, *infra*.)

[9] The vagueness contention was made to the District Court (Tr. 2705-06) but was rejected. The Court of Appeals did briefly consider, and reject, petitioners' further contention that the concept of "control" in the securities laws is void for vagueness. (Appendix A, p. A-6, *infra*.)

> "The appellants' argument that §§ 4 and 5 of the Act are unconstitutionally vague does not call for extended discussion. It will suffice to say that the appellants' defense was not that they misunderstood or misinterpreted the statute but that it was beneath their notice and they knew nothing about it. Under these circumstances we need say no more than that any possible uncertainty in the statute need not trouble us now. There will be time enough to consider that question when raised by someone whom it concerns. *United States* v. *Re*, 336 F.2d 306, 315 (C.A. 2, 1964), *cert. denied* 379 U.S. 904 (1964), and cases cited." (Appendix A, p. A-6, *infra.*)

In their petition for rehearing, petitioners argued that it was error to deny petitioners' standing to challenge as unconstitutionally vague the very provision under which they had been convicted. The petition for rehearing was denied. (Appendix B, p. B-1, *infra.*)

REASONS FOR GRANTING THE WRIT

I. THE ISSUES CONCERNING THE APPLICATION AND VAGUENESS OF SECTIONS 4 AND 5 OF THE SECURITIES ACT OF 1933

A. The Meaning and Application of Sections 4 and 5

1. The Section 5 registration provision is "the heart of the Securities Act of 1933." Note, 78 Harv. L. Rev. 1635 (1965). See also I Loss, *Securities Regulation* 180-81 (2d Ed. 1961). "Indeed, except for the general antifraud provision in § 17, and its civil liability analogue in § 12(2), all the other provisions of the act serve merely to implement § 5." (*Id.*) One of these provisions, of course, is Section 4.

The judgment of the Court below represents the only judicial decision since the passage of the Se-

curities Act of 1933 holding that the Act prohibits the sale of stock through a broker by a controlling person who is not himself an issuer, underwriter, or dealer.[10] The District Judge himself recognized both the importance and the novelty of the issue:

> "[I]f this law has been on the books for so long why hasn't this very important and troublesome question been finally and authoritatively adjudicated long before this?" (A241)

The impact of the decision below is not by any means limited to this case. It is a test case, as the District Judge noted (A241). It directly affects the marketing of securities owned by officers, directors and other controlling persons of the vast majority of corporations whose shares are publicly traded in the United States. Moreover, the case is not limited to the arena of criminal liability. Violation of Section 5 gives rise to civil liability under Section 12(1), 15 U.S.C. § 77l(1). Thus, the decision places in jeopardy of both criminal and civil liability any controlling person who sells his stock through brokers in normal brokerage transactions. The proper interpretation of Section 5 in the context here, then, presents a question of federal law of great public importance which should be settled by this Court.

2. The decision below is, we submit, erroneous. The transactions here were exempt under both Sections 4(1) and 4(2).

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[10] An earlier district court decision had considered the issue—and reached a conclusion contrary to that of the Court of Appeals. See *Value Line Fund* v. *Marcus*, 1964-1966 CCH Fed. Sec. L. Rep. ¶ 91,523 (S.D.N.Y. 1965).

The Language of the Act.—Section 4(1) exempts from Section 5 "Transactions by any person other than an issuer, underwriter, or dealer. . . ." For the purposes of this Section, only a company, such as Continental, can be an issuer. See 15 U.S.C. § 77b(4); *Value Line Fund* v. *Marcus,* 1964-1966 CCH Fed. Sec. L. Rep. ¶ 91,523 at p. 94,972 (S.D.N.Y. 1965). Clearly, too, petitioners were not dealers. See 15 U.S.C. § 77b(12). Finally, there was no assertion by the Government at trial that petitioners were underwriters. Indeed, the theory of the prosecution (*e.g.,* A242-43), of the charge to the jury (A119-20), and of the Court of Appeals (Appendix A, p. A-4, *infra*) was that the *brokers* here were underwriters, that the stock was sold in "transactions by underwriters," and that therefore the sales were not exempt. This involuted theory is not supported by the language of the Statute.

Petitioners' transactions—the sales for which they were indicted—*were* "transactions by any person other than an issuer, underwriter, or dealer" and, accordingly, were exempt from Section 5 under the plain words of Section 4(1). This answers, we think, the Court of Appeals' conclusion "that § 4(1) by its terms exempts only 'transactions,' not classes of persons . . . ." (Appendix A, p. A-4, *infra.*) If Congress had meant to punish sales by a controlling person made "through" an underwriter, it could easily have done so. It did not, and the Court of Appeals' artificial construction of plain words cannot stand—especially in an effort to uphold, for the first time, a criminal conviction. *United States* v. *Weitzel,* 246 U.S. 533, 543 (1918); *United States* v. *Boston & M.R. Co.,* 380 U.S. 157, 160 (1965); *United States* v. *Laub,* 385 U.S. 475, 486 (1967).

Even assuming sales by a controlling person are not exempt under Section 4(1) insofar as the controlling person is concerned, the transactions here were entitled to the brokerage exemption. The undisputed fact, shown by the testimony of every broker who testified on the subject, was that the brokers had engaged only in normal broker's transactions and had collected no more than the usual commission.[11] Section 4(2) specifically exempts from Section 5 "brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders." [12]

The Court of Appeals apparently conceded in its opinion that the brokers here were exempt under Section 4(2) (now 4(4)). But it added *"that § 4(4) was designed only to exempt the brokers' part in security transactions. Stadia Oil & Uranium Co.* v. *Wheelis,* 251 F.2d 269, 275 (C.A. 10, 1957). *Control persons must find their own exemptions."* (Appendix A, pp. A-4 to A-5, *infra*; emphasis added.) But, as demonstrated above, the control persons here *did* find their own exemptions—in the plain words of Section 4(1).[13] And as to the brokers' exemption, we do not claim that anyone other than a broker can claim it; rather,

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[11] Tr. 621, 666, 716, 974-75. Indeed, some of the brokers further testified explicitly that they had not acted as "underwriters." (Tr. 690-91, 745-46, 863-65.)

[12] There is no dispute that the brokers did not solicit orders from petitioners. (Appendix A, p. A-4, n.1, *infra.*)

[13] The Court's reliance on *Stadia* underscores the fundamental error in its theory of the interplay of Sections 4 and 5. In *Stadia,* the seller (the analogue of petitioners here) *was itself an issuer.* 251 F.2d at 275. As such, it was specifically not exempted from Section 5 by Section 4 of the Act. Accordingly, the Court in *Stadia* held that an issuer could not secure exemption for itself by selling through an exempt broker. The Court said: "Stadia, an issuer, cannot escape liability under the Act by having its securities sold

we urge that exempt brokers' transactions are, by definition, not underwriters' transactions.[14] Therefore, there has been no sale through an underwriter, and the transaction is exempt. The legislative history of the 1933 Act underscores the intent of Congress in this regard:

> "[Section 4(2)] exempts the ordinary brokerage transaction. *Individuals* may thus dispose of their securities according to the method which is now customary *without any restrictions imposed either upon the individual or the broker.*" H.R. Rep. No. 85, 73d Cong., 1st Sess., p. 16 (1933) (emphasis added).

The Commission's Own Contemporaneous Construction of the Act.—From the passage of the Securities Act of 1933 until 1946, Section 4(2) was construed as we suggest, so as to permit the unregistered sale of

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through a broker." *Id.* Thus, *Stadia* properly precludes a person subject to Section 5 of the Act because he is an issuer, underwriter, or dealer from bootstrapping an exemption by handling his transactions through a broker. In the present case, in contrast to *Stadia*, it is undisputed that petitioners were *not* issuers, underwriters or dealers and, therefore, they had their own exemption under Section 4(1).

[14] See P.L.I., *S.E.C. Problems of Controlling Stockholders and in Underwritings* 49 (C. Israels Ed. 1962):

> "On the first point, it can be argued that if the broker is exempt he must be treated as a broker and he cannot be an underwriter under Section 2(11). It can be argued that the two concepts are mutually exclusive, and if this is so, then the controlling seller cannot be an issuer under Section 2(11) and thus the transaction is completely exempt under the first part of Section 4(1). That is the view expressed by Professor Loss, when he says:
>
> "'Although the rule [Rule 154] is expressly directed at § 4(2), it was obviously contemplated that the seller's part of the transaction would be considered to be exempt under the first clause of § 4(1) whenever the broker's part came within the rule.' [I Loss, *Securities Regulation* 705, n.178 (2d ed. 1961).]"

stock by controlling persons through brokers, so long as such brokers performed only the usual and normal function. This was clearly the Commission's original understanding of the Act, as shown in the discussion by the General Counsel and Assistant General Counsel of the Commission, Throop & Lane, *Some Problems of Exemption Under the Securities Act of 1933,* 4 Law & Contemp. Prob. 89, 125-27 (1937). It was the understanding until 1946, as shown by the SEC's orders in *United Corporation,* Holding Company Act Rels. 6337 (1945), 6409 (1946), 6649 (1946). These orders granted exemptions for the sale without registration by a controlling person of 600,000 shares of common stock through brokers. As Professor Loss has stated (I Loss, *supra,* at 701):

> "Since there was clear control and no registration statement had been filed under the Securities Act, it was obvious from the Commission's silence that exemption was assumed under Sections 4(1) and 4(4)."

Thus, the Commission had adopted the construction we urge. It subsequently reversed this interpretation of thirteen years' seniority in *Ira Haupt & Co.,* 23 S.E.C. 489 (1946), explicitly stating that it was "overruling" the interpretation it had followed since 1933. (23 S.E.C. at 604-06.) [15] The *Ira Haupt* decision prompted vigorous objection on the part of the leaders of the securities industry. The presidents of both the New York and American Stock Exchanges were critical of the decision, and the president of the New York Exchange testified as follows:

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[15] The *Ira Haupt* decision involved a proceeding against a registered broker-dealer in which an administrative sanction was imposed. There was no holding in the case that the controlling shareholder violated Section 5.

> "It is the position of myself and other representatives of the securities industry that this restrictive interpretation of the exemption granted by the Congress is not correct, cannot be clarified without expensive litigation, and should therefore be made definite and certain by the expression of the exemption in unequivocal terms. We believe that, when Congress said that transactions effected by brokers pursuant to unsolicited orders should be exempt, it meant the exemption to apply to all such orders and implied no such dual caveat as the Commission engrafted upon the statute, first in *Ira Haupt & Company,* Securities Exchange Act of 1934, Release No. 3845, August 21, 1946 . . . ." Staff of Securities and Exchange Commission Subcomm., House Comm. on Interstate and Foreign Commerce, 82d Cong., 2d Sess., Study of the Securities and Exchange Commission 142-43 (Subcomm. Print 1952).

In 1954, the Securities and Exchange Commission partially receded from its *Ira Haupt* interpretation. This was accomplished through the enactment of Rule 154, 17 C.F.R. § 230.154, which involved an administrative interpretation of the exemption provided by the term "broker's transaction" in Section 4(2) of the Securities Act.[16] Rule 154 exempted sales up to one

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[16] In addition to defining the role of the "broker" in terms of the usual and customary broker's function as distinguished from the solicitation of transactions, the Rule also specified that the broker must not be aware that his principal is an "underwriter" or that the transactions are part of a "distribution." Distribution is defined in Section (b) of the Rule as not involving an "amount not substantial in relation to the number of shares or units of the security outstanding." The term "distribution" was further specifically defined, with respect to over-the-counter companies such as Continental Enterprise, to exclude sales within a six-month period of approximately one percent or less of the shares or units of such security outstanding at the time of the receipt by the broker of the order to complete the transaction.

percent of the issuer's outstanding shares unconditionally, so that a controlling person of an issuer could dispose of his stock holdings in normal brokers' transactions without registration in amounts up to one percent, as had been the case prior to 1946. The Rule left untouched the holding of *Ira Haupt* as to sales over one percent. The propriety of such sales obviously would have to be determined as before by construction of the Statute. The Rule sought in a limited way to avoid a confrontation between the pre-*Haupt* doctrine and the post-*Haupt* doctrine as to the meaning of Section 4(2) (now 4(4)) as applied to brokers.

Until now no court has confirmed the Commission's about-face interpretation of the exemption for brokerage transactions provided by Section 4(2) of the Act. And certainly no court nor even the Commission itself has ever held that a controlling person violates the law when he sells in normal brokerage transactions. This case presents the first opportunity on the part of this Court to resolve the interpretation of a basic part of the Securities Act of 1933.[17]

Clearly, the *Ira Haupt* doctrine is an attempt to change the law; it should be rejected absent congressional action. Where an administrative agency completely reverses its earlier interpretation of a statute, the Court owes deference only to the views which were contemporaneous with the enactment of the statute and followed for thirteen years thereafter. See *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396-97 (1956); *New York Central Railroad Co.* v. *United States*, 267 F. Supp. 619, 624-25 (S.D.N.Y. 1967). Especially is

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[17] Professor Loss, in I *Securities Regulations, supra,* at 706, refers to this as "a very fuzzy area . . . where a criminal prosecution is inconceivable as a practical matter."

this the case where the reversal of the interpretation was not based on the theory that the original interpretation was in error, but rather on the theory that a change in the character of the market required a revision of the result. See *Ira Haupt & Co., supra,* 23 S.E.C. at 605. This was clearly an invasion of the Congressional prerogative to consider when changed circumstances require repeal or revision of legislative exemptions. We have urged the contemporaneous construction of Section 4 "by the men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Prod. Co.* v. *United States,* 288 U.S. 294, 315 (1933). The recent and novel view presented here should be rejected—especially in a criminal case. See *Bouie* v. *City of Columbia,* 378 U.S. 347, 352 (1964).

B. The Unconstitutional Vagueness of Sections 4 and 5 as Applied to Petitioners

1. We have set out in Part I A 1, *supra,* pp. 9-10, why we think the interpretation and application of Sections 4 and 5 pose a question appropriate for review by this Court. The same considerations indicate that it is in the public interest for the Court to settle the question whether Section 5, as implemented by Section 4, is unconstitutionally vague.

2. The Court should decide whether, for the purposes of a criminal case, Sections 4 and 5 are (a) too vague to serve as an objective guide to fair adjudication; and (b) too vague to give fair notice and warning of the required conduct.

(a) *Section 5 as implemented by Section 4 is unconstitutionally vague in that it is insufficiently definite to serve as a guide to fair adjudication.*

In *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340 (1952), this Court held:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, *and to guide the judge in its application and the lawyer in defending one charged with its violation.*" (Emphasis added.)[18]

The application of *Boyce* to the present case is striking. *Boyce* held that a criminal statute must be sufficiently definite to guide both "the judge in its application and the lawyer in defending one charged with its violation."[19]

—As to the judge, note that the District Court in the present case said:

> "Wouldn't you agree Mr. Armstrong, that the statute could have been a little more felicitously

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[18] And see Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77-78 (1948):

"It may be accepted as a premise that due process requires the adjudication of an individual's rights and duties to be governed by rules of sufficient objectivity to guard against an arbitrary or *ad hominem* result. It follows that such rules, when embodied in a statute, must be definite enough to enable the judge to make rulings of law and charges to the jury which are so closely referable to the statute as to assure consistency of application.

"Due process requires, in addition, that the rules be sufficiently definite to guide the lawyer in contesting their applicability to his client. Without this latter requirement, the right to a hearing would be of little value, because there would be no adequate standards toward which arguments and evidence could be directed. Both of these requirements would seem to be satisfied by the same degree of definiteness; a statute which is sufficiently definite to guide the judge should also be sufficiently definite to guide the lawyer in litigation, because there the function of each is the same—to test application of rules to particular situations."

[19] See also *Beauharnais* v. *Illinois*, 343 U.S. 250, 264 (1952); *United States* v. *Bel-Mar Laboratories, Inc.*, 284 F. Supp. 875, 880 (E.D.N.Y. 1968).

phrased than it was? Why get into this whole theory about whether the broker infects it by being an underwriter? *Why place upon the trial judge the very heavy burden that I will have in trying to explain this to a lay jury when it could have been set out very, very clearly in terms of the Act's purposes?*" (A244; emphasis added.)

—As to the lawyer, note that the same Court said:

"But their [petitioners'] attorneys say, and I think not without a great deal of persuasiveness, two things that are troublesome. No. 1, they say this in effect is a test case, and one can't help asking one's self as a lawyer if this law has been on the books for so long why hasn't this very important and troublesome question been finally and authoritatively adjudicated long before this?

"Isn't the fact that there has been this long silence itself an indication that the law was lacking either in its explicit provisions or lacking in its terms so as to make it readily enforceable?" (A241)

Thus, the remarks of the trial judge underscored "the very heavy burden" placed on him "in trying to explain this [the interplay of the provisions] to a lay jury. . . ." (A244) They indicate, too, the impossible task faced by petitioners' counsel in attempting to fashion a defense to alleged violations of a statute so imprecise as to admit of two perfectly contradictory intepretations by the administrative agency charged with the statute's application. See the discussion of the *Ira Haupt* decision, *supra,* pp. 14-16.

Counsel have contended from the outset that the statute was too vague. They made a pretrial motion to dismiss the indictment on the ground that no offense was stated. It was denied. (Appendix C.) At the close

of the Government's case, counsel made their position more emphatic:

> "Now, we must know what the theory is upon which we are to proceed with our defense." (Tr. 1134)
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> * * *
>
> "There have been no cases, this is the first case in the entire history of the Securities Act that we have been able to find where a controlling stockholder has been told that his sale of shares may violate the Securities Act." (Tr. 1135)
>
> * * *
>
> "I say, your Honor, that decision [the *Value Line* case, *supra*] by a learned justice of this Court governs this case, and if your Honor is to disagree with that case we are entitled to know it, we are entitled to know the theory upon which there is disagreement so that we may prepare our defense to meet that argument." (Tr. 1137-38)

It was not until *both sides* had rested that defense counsel were informed of the theory of the case—that the Court would charge the jury "that the defendants' transactions were not exempt because the brokers through whom they sold were underwriters. . . ." (Tr. 2285) "The result of leaving the issue so at large was that, as the case was tried, the defendant did not know even at the end of the government's case what he had to meet. . . ." *United States* v. *Remington,* 191 F.2d 246, 250 (2d Cir. 1951), *cert. denied,* 343 U.S. 907 (1952).

> (b) *Section 5 as implemented by Section 4 is unconstitutionally vague in that it is insufficiently definite to give fair notice and warning of the required conduct.*

In *United States* v. *Cardiff,* 344 U.S. 174, 176-77 (1952), this Court stated:

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining *what persons are included* or what acts are prohibited. . . . We cannot sanction taking a man by the heels for refusing to grant the permission which this Act *on its face apparently* gave him the right to withhold. That would be making an act criminal without fair and effective notice." (Emphasis added.)

Precisely that has happened here, both as to Section 4(1), and as to the broker's exemption, Section 4(2). The trial judge himself noted:

> "Behind the statute one must look at a specific provision and when the attorneys call your attention to the specific provision it would seem as though the defendants specifically complied with those provisions." (A241)

He wondered whether "the statute could have been a little more felicitously phrased than it was?" (Tr. 1157) These comments only underscore what everyone knows: "The statutory and administrative regulatory scheme over this area is far from a model of clarity. . . ." *United States* v. *Crosby,* 294 F.2d 928, 942 (2d Cir. 1961), *cert. denied,* 368 U.S. 894 (1962). See also I Loss, *supra,* p. 180. *Crosby* went on to say, "such a situation is aggravated when, as here, criminal liability is based on the failure to comply with the law." (294 F.2d at 942.)

The registration provisions of the Securities Act should be judged according to the "picture" they "evoke in the common mind." *McBoyle* v. *United States,* 283 U.S. 25, 27 (1931). Under that test, "it would seem as though the defendants specifically complied with those provisions" (Tr. 1152). If they have not, the Statute has not given fair warning.

As to the broker's exemption provided by Section 4(2), the trial court remarked:

> *"They were acting through brokers, the brokers executed the customer's orders or the authorized agent of the customer's and therefore they complied with the specific terms of the statute.* So that one is forced to ask one's self what kind of statute is this? It flags an intention, it proclaims a very beneficent intention of protecting the investing public and then in its provisions *it says to a particular defendant or a person in his position, you deal through a broker and he acts on your orders, you are not covered by this provision."* (A241-42; emphasis added.)

Thus, here, as in *United States* v. *Cardiff, supra,* the Court is faced with a statute which "on its face apparently gave . . . the right" to act in a way the Government now seeks to punish. Such punishment, we submit, results in "making an act criminal without fair and effective notice." *United States* v. *Cardiff, supra,* 344 U.S. at 176-77.

As we have pointed out in our discussion of the *Ira Haupt* case, the broker's exemption provided by Section 4(2) has been subject to two diametrically opposed administrative constructions. Where "men of common intelligence must necessarily guess at its meaning and differ as to its application," a penal statute "violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). The Commission, we submit, has always been composed of "men of common intelligence." And, as we have shown, even it has had to guess at the meaning of Section 4(2)—and has differed as to its application.

II. THE QUESTION OF PETITIONERS' STANDING TO ATTACK THE VAGUENESS OF SECTION 5 AS IMPLEMENTED BY SECTION 4

1. As we noted above, petitioners contended on appeal that Section 5, as implemented by Section 4, was unconstitutionally vague.[20] The Court of Appeals held that petitioners' defense at trial had been that they knew nothing about the Statute and that, for this reason, they did not have standing to challenge it as being unconstitutionally vague. The Court said: "Under these circumstances we need say no more than that any possible uncertainty in the statute need not trouble us now. There will be time enough to consider that question when raised by someone whom it concerns." (Appendix A, p. A-6, *infra.*) The Court thus held that a defendant cannot attack as unconstitutionally vague the very provision under which he is charged, tried and convicted, if his defense at trial is that he was ignorant of that provision. This holding is in direct conflict with applicable decisions of this Court. See, *e.g., Boyce Motor Lines* v. *United States,* 342 U.S. 337, 340 (1952), quoted at p. 18, *supra.* As *Boyce* makes abundantly clear, "one charged with [a criminal statute's] violation" must, of necessity, always have standing to attack it as being too vague to guide his lawyer and the judge and jury—else the mandate of *Boyce* would be utterly meaningless.

The decision of the Court below is also in clear conflict with the recent decision of the Court of Appeals for the District of Columbia in *Ricks* v. *United States,* No. 20,919A (D.C. Cir., December 23, 1968) (Appendix D, pp. D-1 to D-15, *infra*). *Ricks* explicitly held that

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[20] The contention was also made to the District Court (Tr. 3705-06).

appellants had standing to attack the statute under which they were convicted as vague where, among other things, appellants contended that the ambiguities in the statute left "judicial officers free to assess their guilt solely on the basis of conjecture" (Appendix D, p. D-6, *infra*). The Court granted standing and found the statute too vague to enable "administrators or jurists to confidently make applications." (*Id.*, p. D-8.)[21]

The decision below not only conflicts directly with applicable decisions of this Court and with a decision of another Court of Appeals, but does so in an area of broad reach in the administration of criminal justice. As we read the decision, it holds squarely that once a criminal accused asserts the defense that he was ignorant of a statute's proscription, he loses standing to argue that the statute is so vague that he cannot be adequately defended[22] and fairly tried under it. This Court should resolve the conflict presented by this decision. This is particularly true where, as here, the jury has apparently *rejected* the defendants' contention and thus may well have found that they did in fact know of the statutory requirements.

2. The decision of the Court below is clearly erroneous. As *Boyce* makes clear, an adjudicative as well as a notice function is fulfilled by the requirement of definiteness. A statute must be sufficiently definite to

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[21] And in *Ricks*, as here, the Government had contended that appellants were attempting to " 'attack the statute on the ground that its language might permit it to be applied in an unconstitutional manner to other people in hypothetical situations not involved in the instant case.' " (Appendix D, p. D-5, *infra*.)

[22] For this reason, we think, the decision of the Court below also raises problems of right to counsel under the Sixth Amendment. *Cf. United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921).

serve as an objective guide to fair adjudication. This requirement must be satisfied without regard to the accused's knowledge of a particular statute at the time he acted, if he is subject to conviction for violating it. Surely, any defendant has standing to argue that a statute is not sufficiently definite to enable the judge or jury to make an objective determination of his guilt, or to enable his counsel to prepare an adequate defense. Until now, no court has ever held otherwise. The Court below apparently made the mistake of assuming that there is only one test—whether the statute functions to give fair notice of the required conduct—governing the question whether a criminal statute is sufficiently definite.[23]

The cases relied upon by the Court of Appeals are not in point. Each of them presented a situation where a defendant attacked as vague, portions of a statute under which he was *not* charged, the portions of the same statute under which he *was* charged being clear. Thus, *United States* v. *Re,* 336 F.2d 306, 315 (2d Cir.), *cert. denied,* 379 U.S. 904 (1964), cited by the Court of Appeals, involved a contention by defendants that they had acted as *specialists,* and that certain portions of the securities laws presented " 'an inconsistent, vague and confusing statutory scheme which fails to give adequate warning to a *specialist* of what he can and cannot do.' "

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[23] Even if the notice function were the only one it would be incorrect to hold that one who "knew nothing about" a criminal statute lacked standing to attack its vagueness. Had the statute been sufficiently definite, the accused might have known about it. See Note, *supra,* 62 Harv. L. Rev. at 79-80: "[I]f a man is to be charged with knowledge of all his rights and duties under a statute regardless of whether he has read or understood it, fundamental fairness requires that he be given at least the opportunity to discover its existence. . . ."

336 F.2d at 314 (emphasis added). But, it was "inherent" in the jury's verdict in *Re* that the defendants "were not performing the function of specialists," and it was not argued that the applicable securities laws were "unconstitutionally vague as applied to non-specialists, a theory previously rejected in this circuit." 336 F.2d at 314, 315. Thus the court in *Re* could well rely on *United States* v. *Wurzbach,* 280 U.S. 396,399 (1930), and its holding that "[t]he objection to uncertainty concerning the persons embraced need not trouble us now. * * * [I]t will be time enough to consider it when raised by someone whom it concerns." *Wurzbach,* like *Re,* involved an attack on provisions of a statute not applicable to the defendant. There a Representative of the House argued that the Federal Corrupt Practices Act was uncertain and vague as to the persons embraced, yet the Act specifically referred to a "Representative in . . . Congress. . . ." Thus, there was "no doubt that the words include representatives. . . ." As to the contention aimed at the more ambiguous categories of persons the Court held "it will be time enough to consider it when raised by someone whom it concerns." *Wurzbach, supra,* at 399. The other cases relied on in *Re* are similarly inapplicable to the situation presented here. See *United States* v. *Raines,* 362 U.S. 17, 21 (1960); *Dennis* v. *United States,* 341 U.S. 494, 516 (1951).

All these cases hold only that one cannot attack vague provisions of a statute if they do not concern him. But none of those cases—nor, indeed, any case—holds that an accused lacks standing to attack as too vague to serve as a guide to a fair adjudication, the very provisions under which he is convicted, simply because he may have been ignorant of those provisions when he acted.

CONCLUSION

For the reasons stated, this Petition for Certiorari should be granted.

Respectfully submitted,

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